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Balancing Fairness and Predictability: An Analysis of Proposed Modifications to Standards Regarding the Enforcement of Prenuptial Agreements

Morgan McAtamney

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I. Introduction

In recent years, prenuptial agreements[1] have gained popularity.[2] This had been attributed to, among other things, widespread media attention and acceptance, as well as the recent economic downturn and each individual's desire to maintain control of his or her assets.[3] However, despite this increase in acceptance, fewer than ten percent of newlyweds sign prenuptial agreements.[4] Though some critics have suggested that this occurrence is due to the lack of predictability in enforcement, studies have shown that it is more likely that the combination of optimism bias and the lack of knowledge regarding rights upon divorce play a larger role in this phenomenon.[5]

Though the proportion of couples signing prenuptial agreements is still low, the fact that anyone is contracting regarding rights upon divorce is a recent phenomenon.[6] Until the mid-1970s, prenuptial agreements contracting for specific property distribution at divorce were considered against public policy and, therefore, unenforceable.[7] Since that time, acceptance has become widespread and nearly all agreements are upheld by the court. For example, courts in Pennsylvania have established a strict freedom of contract philosophy which only authorizes non-enforcement when traditional contract defenses are proven.[8]

This rapid spread of acceptance resulted in standards which were far from uniform, making enforcement unpredictable and, thus, problematic. Therefore, in 1983, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act (UPAA). This act aimed to encourage enforcement while promoting the institution of marriage.[9] It has since been adopted, in some form, by twenty-six states and the District of Columbia.[10]

The UPAA, seeking to reflect the standards of a majority of states, expressly established that prenuptial agreements involve special circumstances that are not implicated in traditional contract settings.[11] Specifically, the uniform act incorporated the widely held belief that parties to such an agreement do not bargain at arm's length and are uniquely likely to trust the information provided by the other party.[12] The UPAA, thus, includes a requirement that spouses engage in full and fair disclosure of assets prior to signing a prenuptial agreement.[13] However, disclosure is not required if the contesting party has constructive notice of the opposing party's wealth or if there is an express, written waiver of disclosure.[14]

In addition to the disclosure requirement, the UPAA dictates two specific standards for policing prenuptial agreements.[15] First, the agreement must have been voluntarily entered.[16] Though the voluntariness standard is not defined in the act, it has been interpreted in many states to include evidence of fraud, duress, or undue influence. Second, the agreement must not be unconscionable at signing, but will only be unenforceable if the disclosure requirement is also not satisfied.[17] The practical result of the second requirement is that certain unconscionable agreements will be enforced if there was full and fair disclosure, if disclosure was waived, or if the contesting party had constructive notice of the opposing party's assets.[18]

Though many states have adopted the UPAA, various modifications have been made to the uniform statute and, thus, standards still vary widely across jurisdictions. However, in a majority of these states, engaged couples are considered to be in a confidential relationship.[19] This relationship both justifies the disclosure requirement and creates a duty to "'exercise the highest degree of good faith, candor, and sincerity in all matters bearing on … the proposed agreement, with fairness being the ultimate measure.'"[20] However, even while recognizing that

parties stand in a confidential relationship, most courts require proof of substantial inequality and significant unfair bargaining tactics prior to refusing to enforce a prenuptial agreement.[21]

This refusal to acknowledge unfair tactics by individuals contemplating marriage has caused concern in recent years. Since the turn of the century courts and scholars have raised various concerns which will be analyzed below and have created several arguments for and against having a high standard for analyzing such agreements. [22] This discourse has resulted in three important changes in the law. This proposal will explain each in turn, will compare the results, and will ultimately recommend a solution which raises such agreements to a higher standard that serves to decrease inequalities in bargaining power and increase predictability.

II. Concerns Raised by Current Standards

As stated above, it is almost universally accepted that prenuptial agreements are generated from unique relationships and, therefore, should be subject to different rules than traditional contractual relationships.[23] In determining whether to enforce a prenuptial agreement, most states consider when the agreement was signed in relation to the date of marriage, whether each party had independent counsel, and other unique circumstances that may disproportionately influence signing in the analysis of voluntariness.[24] However, these standards, while aiming to protect weaker parties, fail to adequately address inequalities of bargaining power, place the burden of avoiding the agreement on the weaker party, and generate incredibly high standards for involuntariness.[25]

A. Inequality of Bargaining Power

The main concern presented by the current enforcement standards for prenuptial agreements is the utilization of one parties' significantly increased bargaining power to induce unfavorable agreements. It is well established that most couples who sign prenuptial agreement

are on an unequal footing when it comes to the power to negotiate.[26] And, as is even more concerning, prenuptial agreements tend to reach beyond what is necessary to protect a party's interests.[27] This is especially problematic as a significant majority of states do not require independent counsel or a knowledgeable waiver of rights in order to uphold a prenuptial agreement.[28]

At least a slight inequality of bargaining power is implicated in most relationships in which one party requests a prenuptial agreement.[29] This is due to the nature of the agreements themselves. Specifically, these agreements are designed to protect a party whose assets grow disparately during marriage or whose assets are significantly larger than their significant other's at marriage.[30] In fact, the majority of individuals who request prenuptial agreements are those who have significant wealth, have already been divorced, and/or are marrying at an older age.[31] These individuals, logically, have both more experience with financial and legal matters and increased access to professionals who can provide advice and guidance than their significant others. Thus, they are able to create agreements that disproportionately benefit them and, as we will see, are uniquely equipped to ensure that their partners are aware of the consequences of such agreements.

In addition to these typical power arrangements, other unique, often problematic situations are presented in the context of prenuptial agreements. These include disparities in education and business knowledge, pregnancy, and immigration concerns.[32] For example, in *In re Marriage of Bonds*, the California Supreme Court upheld a prenuptial agreement between baseball player Barry Bonds and his now ex-wife Susann (Sun) despite the fact that (1) Barry had significantly more assets and experience (both business and legal) than Sun, (2) Sun was not legally represented, and (3) English was not Sun's native language.[33] Despite the significant

disparity in resources and expertise, the court found that the agreement was entered into voluntarily and with reasonable disclosure of assets.[34] In its decision, the court emphasized that Sun was clearly notified that this agreement was adverse to her statutory rights at divorce and that she and Barry had agreed to retain their separate property during marriage long before they were actually wed.[35]

Though such tactics may seem to be the exception, case law is filled with instances of unfair bargaining tactics.[36] And, in most cases, courts across the United States will uphold these agreements while acknowledging the use of tactics to pressure the opposing party into signing.[37] For example, in *In re Estate of Ingmand*,[38] the court explicitly acknowledged that the deceased husband's actions in persuading his fiancé to sign the prenuptial agreement would likely be categorized as "unfair pressure tactics."[39] However, the court upheld the agreement, holding that such tactics "did not negate the knowing and voluntary nature of the execution."[40]

This unique imbalance of power present in couples engaged to be married was acknowledged by the drafters of the UPAA.[41] However, rather than addressing this issue by refusing to enforce unconscionable agreements, the majority of drafters insisted that the 'voluntariness' requirement would ensure that weaker parties would be protected.[42] However, many courts have found that, despite the existence of a confidential relationship between parties, any inappropriate pressure that does not amount to the traditional standards for duress or undue influence does not undermine the enforceability of such an agreement.[43] Though this will be addressed in depth below, it is clear that, as neither the voluntariness standard nor the unconscionability standard adequately addresses the typical inequality of bargaining power present in parties to a prenuptial agreement, the current standards are inadequate.

B. Problematic Voluntariness Standards

As stated above, the issues created by disparate bargaining power are exacerbated by inconsistent and often inadequate standards for 'voluntariness'. Neither the UPAA nor most state statutes expressly define the term voluntary.[44] Some states have adopted a 'totality of the circumstances' test which includes an analysis of the situation surrounding the drafting and signing of the agreement.[45] However, a large minority of states require evidence of the traditional contractual defenses of fraud, duress, or undue influence before establishing that the agreement was signed involuntarily.[46] It is this significant disparity in standards, along with many courts' attitudes regarding when such standards are met, that present significant problems.

States that have adopted the totality of circumstances test espoused in *In re Marriage of Bonds*, are clearly preferable to those which employ contract defenses. This is because the months leading up to marriage are not comparable to those leading up to a commercial contract. In *Bonds*, the court considered the parties' bargaining power, evidence of coercion, the amount of time between signing and the wedding, the use of independent counsel, and the knowledge of the waiving party.[47] However, these considerations still generally result in a finding of voluntary signature.[48] For example, in *Bonds*, though the wife was not independently represented, signed the agreement the day prior to the wedding, had no business or legal expertise, and testified that she was unable to adequately understand the terms of the agreement, the court found no evidence that the document was signed involuntarily.[49]

Even more problematic, in jurisdictions that apply standards of fraud, duress, or undue influence, it is incredibly difficult to provide evidence that violates these standards. In fact, in order for circumstances to rise to this level, there typically must be evidence of a "wrongful or unlawful threat that gives the other party no reasonable alternative … [or] influence that deprives

a person of his or her freedom of choice."[50] Thus, because an individual always has the option not to marry, it is nearly impossible to prove that a signature was involuntary. However, courts often refuse to consider the substantial financial cost, embarrassment, and significant time expended when cancelling a wedding with such short notice.

Additionally, despite the difficulties of proving involuntariness, a majority of cases include evidence of substantial pressure to sign. For example, in *Simeone v. Simeone*,[51] the wife (Catherine) and husband (Frederick) signed a prenuptial agreement limiting Catherine's interest in property acquired during the marriage and any spousal support payments upon dissolution.[52] At the time of the marriage, Frederick was sixteen years Catherine's senior, was employed as a neurosurgeon, and had assets totaling approximately $300,000.00.[53] Catherine, on the other hand, was unemployed and had no assets to her name.[54] One day before the couple was to be married, Frederick and his attorney presented Catherine with the agreement and threatened to call off the wedding if she refused to sign it.[55] Catherine was not given any opportunity to consult with independent counsel nor was she advised of the legal rights she was agreeing to forego.[56] Despite the timing of this presentation and Catherine's lack of reasonable opportunity to review and/or negotiate terms, the court determined that her signature was voluntary.[57]

It is this case and many others like it that prove just how difficult it is to challenge a prenuptial agreement. Although the drafters of the UPAA believed that inequality of bargaining power and significant pressure to sign would be easily addressed under the 'voluntariness' prong, this has proved to be untrue.[58] Regardless of the standards a jurisdiction implements, only a small minority allow the court to consider timing, lack of independent counsel, or lack of knowledge regarding what is being waived in an analysis of voluntariness.[59] Thus, based on the inducement of his or her partner, an individual may be urged to sign an agreement he or she does

not understand without time to consider, opportunity to consult an expert, or the ability to negotiate terms. It is this lack of meaningful choice which does not render the agreement involuntary that makes the current voluntariness standards inadequate.

C. Burden of Proving the Agreement is Unenforceable is on the Weaker Party

Finally, the current standards are problematic because they place the burden of challenging the agreement on the weaker party. As explained above, in most situations involving prenuptial agreements, there is a significant disparity in bargaining power between parties.[60] This disparity often results in a weaker party being convinced to sign an agreement shortly before a costly wedding without really understanding what is being waived.[61] Then, after being pressured into the agreement in the first place, the weaker party must provide evidence establishing these unfair bargaining tactics.[62] However, this evidence generally comes in the form of testimony by the parties and their attorneys, if any. Clearly this presents significant complications in challenging an agreement, especially when combined with the high standards for voluntariness explained above.

This challenge, though, could be solved by imposing a standard of 'utmost good faith' required of parties who are in a confidential relationship. For example, in California, though engaged couples are not considered to be in a confidential relationship, once married, this changes.[63] Based on this confidential relationship, courts impose a burden on the proponent of a marital agreements[64] to establish that the agreement was not obtained through improper means.[65]

The placement of the burden on the stronger party is also present in other situations involving confidential relationships. For example, in *Bonds*, the California Court of Appeals acknowledged that, in traditional contracts in which parties are in a confidential relationship, there is a burden shifting arrangement which requires careful scrutiny of an agreement when one

party is unrepresented by counsel.[66] Similarly, in the trust and estate context, most jurisdictions employ a burden shifting framework when analyzing whether a party exerted undue influence over an individual with which they had a confidential relationship.[67] Finally, confidential relationships in business eliminate the traditional burden of discovery and create a duty on the opposing party to disclose all pertinent information.[68] It is clear from these examples that, generally, confidential relationships create a framework for shifting burdens from the agreement's challenger to the proponent in order to decrease disparities in bargaining power.[69] It seems strange that, in a context that is plagued by unequal bargaining power and presents such unique circumstances, courts would not apply these same burden shifting frameworks available in the above situations.

III. Arguments for a Higher Standard

Concern with current standards for policing prenuptial agreements suggests the need for a higher standard. The existence of unique relationships, lack of intelligent waiver, and promotion of public policy distinguish prenuptial agreements from ordinary contracts. Traditional contractual defenses are insufficient to protect parties to such a unique agreement.

A. Unique Circumstances

As stated above, the prenuptial agreement context presents circumstances entirely different from those present in traditional contract settings. In addition to the natural inequality of bargaining power and the length of time between contracting and enforcement (if enforced at all), parties are uniquely unlikely to advocate for their best interests.[70] This is because, unlike commercial contractual relationships, parties to a prenuptial agreement experience incredible optimism bias and are uniquely unaware of the rights being waived.[71]

First, it is commonly acknowledged that, despite incredibly high divorce rates in the United States, most individuals severely discount the possibility of their own divorce.[72] For example, a poll conducted in 2012 by Clark University revealed that 86% of 18-29 year olds believed that their marriage would last forever.[73] In a similar study conducted by Heather Mahar of Harvard University, respondents estimated their chance of divorce at approximately 12%, significantly lower than the national divorce rate of 50%.[74] This optimism bias has proven to reduce the likelihood of obtaining a prenuptial agreement in the first place.[75] It is also likely a deterrent to adequately addressing concerns within the agreement itself.

In conjunction with the problem of optimism bias, parties contemplating marriage are generally unaware of their rights upon divorce.[76] In fact, a study by Lynn A. Baker and Robert E. Emery in the mid-1990s established that recently married couples correctly stated the effects of divorce slightly more often than random chance would predict.[77] This same survey was provided to approximately 100 law students, both before and after taking a basic family law course.[78] These results, though much more accurate than that of the general public, still displayed a highly inaccurate understanding of rights upon divorce.[79] In fact, even after completing a family law course, only approximately 70% of the responses were correct.[80] This clearly establishes that even the most educated and experienced couples contemplating marriage tend to be unaware of the rights they may waive by signing a prenuptial agreement.

It is the combination of this misplaced optimism and the lack of knowledge regarding rights that makes parties contemplating marriage uniquely unable to negotiate terms in prenuptial agreements. Unlike traditional contractual relationships in which parties can clearly identify what is and is not in their best interests, individuals who are simultaneously being pressured into signing an agreement they do not understand by a person they are expected to share the rest of

their life with and planning one of the most extravagant, expensive days of their lives, are unlikely to be able to negotiate a more favorable arrangement. In fact, all of these considerations have been acknowledged by a majority of jurisdictions, as evidenced by the recognition of a confidential relationship.[81] However, most jurisdictions do not adequately enforce the standard. Confidential relationships require more than just simple good faith; they require the parties treat one another with the utmost good faith and impose a duty to act for the benefit of the other.[82] Choosing not to enforce these duties results in the imposition of incredible pressure and agreements that were not voluntarily signed.[83] Therefore, though jurisdictions do attempt to acknowledge the unique relationship of parties to prenuptial agreements, the current standards are inadequate as they fail to address the existence of optimism bias and lack of knowledge regarding rights which is unique to this context.

B. Ineffective Standards Regarding Knowledgeable Waiver

The absence of any duty in the part of the stronger party to explain the rights that are being given up undercuts the requirement of knowledgeable waiver. The disclosure requirement itself seems to be based on a policy to ensure knowledgeable waiver.[84] This requirement, however, has been inappropriately limited to knowledge of the financial situation of the opposing party.[85] This is problematic as it assumes that individuals are aware of the consequences of their agreement, an assumption that, as established by the research of Heather Mahar, Lynn Baker, and Robert Emery explained above, is wildly inaccurate.[86]

The current standards for prenuptial agreements do not ensure knowledgeable waiver. Such waiver be easily accomplished by enforcing the standard of 'utmost good faith' implicated in such a confidential relationship. For example, if parties were either required to obtain independent counsel or be advised in writing of the practical consequences of such an agreement,

for example the rights under the jurisdiction's divorce statute which are being waived, courts could be confident that waivers are both knowledgeable and voluntary.[87] Thus, public policy, which seems to support parties bargaining with full knowledge of the consequences of their actions, would be satisfied by the establishment of a slightly higher standard for prenuptial agreements.

C. Promotes Public Policy Recognized in Analogous Circumstances

A higher standard for prenuptial agreements is also supported by policy preferences in similar legal circumstances. In particular, the policy against disinheriting spouses present in trust and estate contexts and the policy against taking advantage of weak parties present in the prevention of adhesion contracts offer useful insights into the commonly acknowledged rights of contracting parties in similarly special circumstances.[88] Both the unique relationships and the inherent inequality of bargaining power between couples contemplating marriage seem to justify a higher standard in these analogous contexts and, therefore, these policies should be extended to the instant situation.

1. Policy Preference Against Disinheriting Spouses

In a majority of jurisdictions, spouses are entitled to what is known as a 'forced share' of the deceased's estate at death.[89] The concept of the forced share entitles a spouse to a certain portion of the estate regardless of the existence of a will which states otherwise.[90] This limit on the testamentary power of an individual has long been considered a "token of the solemnity of the matrimonial union," and is considered to defend the public policy favoring spouses supporting one another even after the marriage ends.[91]

It is difficult to differentiate the policy preference for protecting spouses from contracting regarding rights upon death and those upon divorce. In fact, as previously explained, long prior

to allowing prenuptial agreement that contracted for rights upon divorce, prenuptial agreements were enforced when they contracted for rights upon death.[92] Thus, it can be assumed that, despite the existence of forced share laws and the policy against entirely disinheriting spouses, it was believed that limiting rights upon death was considered more acceptable than upon divorce. It seems strange that the same courts that, for so long, favored limiting the rights upon death to those upon divorce would entirely eliminate this preference merely because there is no longer an absolute ban on prenuptial agreements regarding divorce. In fact, the first case to find a change in public policy expressly stated that contracts distributing marital property should be treated the same regardless of whether the marriage was to be terminated by death or divorce.[93] In other words, the institution of marriage imposes a heightened requirement of support for one's spouse which justifies a stricter review of any attempt to limit this responsibility at the conclusion of the marriage, whether by death or divorce.[94] Therefore, public policy requires a heightened standard of review for prenuptial agreements based upon the unique rights and responsibilities inherent in a marital relationship.

2. Policy Preference For Protecting Weak Parties

In other contractual relationships, courts have imposed protections for weak parties based on inequality of bargaining power.[95] For example, typically in the context of insurance contracts, less sophisticated parties are allowed to defend against contracts if they are considered contracts of adhesion.[96] Though prenuptial agreements do not quite rise to the level of adhesion contracts as they do not employ standard or boilerplate language, there are a fair number of comparisons that should justify extending the policy of protecting parties with less bargaining power to the prenuptial agreement context.

An agreement is considered to have been signed involuntarily and, is thus, a contract of adhesion if it is a "standardized contract written entirely by a party with superior bargaining power … [and t]he weaker party … must "take it or leave it," and be without opportunity to bargain."[97] This is substantially similar to the situation present in prenuptial agreements. Though, as stated above, prenuptial agreements are unlikely to be considered 'standardized,' they do generally limit one party's rights upon dissolution of marriage. Furthermore, these contracts are almost always categorized by a severe inequality of bargaining power and incredibly unattractive alternatives to signing.[98] It is this discrepancy in bargaining power, inability to adequately negotiate, and the potential for a lack of alternatives that justify extending the widely accepted policy preference for "protect[ing] the subservient party … [and] insur[ing] equal protection and treatment under the law," to the context of prenuptial agreements.[99] Therefore, as in contracts of adhesion, prenuptial agreements should be subject to stricter scrutiny than traditional commercial contracts.

IV. Common Criticisms of Higher Standard

Despite the common acknowledgement of unique concerns in the context of prenuptial agreements, some experts argue vehemently against a higher standard. These experts seek to avoid regulation, instead favoring only the employment of basic contract protections. The most compelling of these arguments rely on the parties' freedom of contract, the desire for predictability, and the desire to escape gender bias. While all of these arguments seem to have some merit, they fail to adequately address the reality of prenuptial agreements and, therefore, are not sufficient arguments against a higher standard.

A. Freedom of Contract

The most obvious argument against regulating prenuptial agreements is that the state does not have the power to interfere with each individual's freedom to contract. Proponents of this view argue that "[p]renuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts."[100] This standard was adopted in Pennsylvania in *Simeone v. Simeone*. However, even the majority of *Simeone* itself acknowledges that parties contemplating marriage are not bargaining at arm's length and, therefore, are not bargaining as traditional parties to a contract would.[101] Furthermore, it is well established that marriage is an institution in which the state has great interest.[102] This interest requires regulation of both entry and exit because families are considered to be the "building blocks" of society and protection and promotion of such associations is paramount to maintaining orderly communities.[103] Therefore, the strict 'freedom of contract' argument does not adequately address the well-established concerns and policy preferences implicated in this context.

The policy preference for encouraging marriage has long been recognized in the United States.[104] Marriage is seen to promote health and well-being, both physically and emotionally, for the entire family.[105] In fact, the majority in *Simeone* states that, but for broad enforcement of prenuptial agreements, "[p]arties might not have entered marriages,"[106] clearly suggesting that marriage is something to be promoted at all costs. Therefore, it is well established that the state has an interest in promoting marriage which has resulted in various regulations on the entry and exit. Any regulation of the entry of prenuptial agreements (on which marriages have traditionally been conditioned) is merely an extension of this interest.

Furthermore, exclusive reliance on traditional contract regulations is misplaced. As analyzed above, prenuptial agreements are unlike traditional commercial contracts in that parties do not bargain at arm's length, are in a unique trust relationship, typically have vastly unequal bargaining power, are distinctively unaware of the rights they are bargaining away, and genuinely believe that the bargained for terms will never be performed.[107] Based on these five differences, it is disingenuous to maintain that parties are able to bargain in the same way they would in any other contractual context. Thus, when combined with the state's established interest in marriage, it is clear that any comparison to traditional contractual relationships is misplaced.

B. Predictability

Emerging from the freedom of contract justification is the policy argument emphasizing the importance of predictability for those drafting prenuptial agreements. Essentially, many proponents of broad enforcement suggest that, in order for prenuptial agreements to be worth drafting, parties must be able to predict whether or not they will be enforced upon divorce.[108] And, according to these individuals, the only way to ensure predictability is to guarantee broad enforcement.[109] This is simply untrue. By creating a heightened standard that ensures fair negotiations through the recommendations explained below, predictability will increase but not at the expense of fairness.[110]

As previously stated, it is commonly acknowledged that prenuptial agreements typically involve parties of unequal bargaining power and, at least in certain circumstances, the imposition of pressure to sign such an agreement.[111] It is the inconsistency in implementing well-established policy to protect individuals from unfair bargaining tactics and unreasonable agreements that has resulted in uncertainty of enforcement in the first place.[112] However, rather than remedying

inconsistency, critics merely assert that predictability is more desirable than protecting vulnerable individuals, and, therefore, a higher standard is improper.

States need not be forced to choose either predictability or fairness. In fact, if a heightened standard (one that many states already claim to embrace) is enacted and certain requirements are imposed, predictability will easily be achieved. The standards recommended at the conclusion of this proposal create a set of conditions that, if satisfied, will establish that the parties bargained in good faith and, thus, that the agreement was voluntarily signed and is not unconscionable. There can be no question that such required conditions will both serve to promote predictability and good faith bargaining.

C. Gender Bias and Paternalism

Finally, one of the primary justifications for the broad contractual freedom approach employed in Pennsylvania is that spouses are no longer "of unequal status" and that employment of a heightened standard for parties contemplating marriage would perpetuate "[p]aternalistic presumptions … [which] have, appropriately, been discarded."[113] This argument insists that all parties entering marriage are equal and any regulation of prenuptial agreements must necessarily be based on gender.[114] Though it is true that women still primarily undertake family care of children, generate less wealth during marriage, and, thus, disproportionately benefit from these heightened standards, such realities do not "perpetuate gendered stereotypes about women and their ability to contract."[115]

It is incredibly unwise to refuse to create standards to protect individuals with lesser bargaining power simply because these standards might disparately benefit one gender. In fact, not one statute currently employed to protect parties from unequal bargaining power allows consideration of gender.[116] The fact that these statutes may disparately benefit women over men

stems from the fact that there remains an unequal proportion of women negatively affected by prenuptial agreements.[117]

Even Justice Papadakos of the Pennsylvania Supreme Court in his concurrence to *Simeone* explained that his concurrence was written "because, it must be clear to all readers, [the majority opinion] contains a number of unnecessary and unwarranted declarations regarding the 'equality' of women."[118] The opinion goes on to recognize the fact that gender inequality remains a problem to this day and that prenuptial agreements often involve parties of unequal bargaining power.[119] Furthermore, Justice Papadakos refused to invalidate protections for subservient parties based on the fact that they, in many if not most circumstances, may benefit women.[120] Ultimately, as the *Simeone* concurrence recognizes, the idea that the eradication of paternalism necessitates broad contractual freedom in prenuptial contexts fails to adequately recognize the realistic relationship of parties contemplating marriage and, therefore, is not a legitimate criticism to a heightened standard of review.[121]

V. Three Proposed Solutions

In the years since the UPAA was drafted, several monumental cases (including some of the cases discussed above) have interpreted the various state statutes in unpredictable ways. In contrast to the expectation of the drafters of the UPAA, the voluntariness standard has not sufficiently protected parties with less bargaining power, a reality that has sparked significant criticism.[122] This failure has resulted in several attempts to increase both predictability and protection. Three of these attempts will be explained below: the Uniform Premarital and Marital Agreement Act, California Family Code § 1615, and the American Law Institute's Principles of the Law of Family Dissolution Chapter Seven. Each standard is increasingly strict.

A. Uniform Premarital and Marital Agreement Act

The Uniform Premarital and Marital Agreement act (UPMAA) was drafted by the Uniform Law Commission in 2012 and is considered the successor to the UPAA.[123] As of March 2015, only two states, North Dakota and Colorado, have enacted the UPMAA and one more, Mississippi, has proposed enactment.[124] The UPMAA modifies the UPAA in that prenuptial agreements are unenforceable if (1) they are not signed voluntarily without duress, (2) either party did not have access to independent counsel, (3) there is no express notification of the waiver of rights, or (4) there has been inadequate financial disclosure.[125]

First, while the UPMAA is intended to modify the UPAA, the comments to Section 9 of the UPMAA expressly state that the "use of the phrase 'involuntary or the result of duress' in Subsection (a)(1) is not meant to change the law."[126] Therefore, it should be assumed that each state's current case law regarding the voluntariness standard is to be retained and utilized to interpret the voluntariness of each parties' signature.[127]

Second, though the language of the requirements seems to indicate that each party should be represented by independent counsel, the UPMAA goes on to define access very liberally. Under Section 9(b), each party has access to independent counsel provided that they have time to consider whether to hire counsel and to locate such an attorney and, if the other party is represented, have the financial ability to hire another attorney.[128] Thus, the requirement of access to counsel is not sufficiently different from the standard currently used by many states.

Third, the UPMAA requires an explanation of waiver for parties not represented by independent counsel.[129] This standard, however, merely requires the following recitation:

> If you sign this agreement, you may be: Giving up your right to be supported by the person you are marrying or to whom you are married. Giving up your right to ownership or control of money and property. Agreeing to pay bills and debts of the person you are marrying or to whom you are married. Giving up your right to

> money and property if your marriage ends or the person to whom you are married dies. Giving up your right to have your legal fees paid.[130]

Though this is a significant improvement from the lack of information required under the UPAA, it does not sufficiently explain the rights of the parties. It is unlikely that a party who is unaware of his or her rights and is unexperienced in legal matters would recognize the significance of this standard form waiver. It is similarly unlikely that this particular language would increase the understanding of his or her rights upon divorce. This standard language merely recites the possibility that rights are being waived without adequately explaining what these rights actually are or informing the party of consequences particular to the agreement itself. Therefore, it is questionable whether this would improve the protection of parties.

Finally, the act continues to require the disclosure of assets between parties.[131] Though this does not seem to be a change from the UPAA, it is significant that the UPMAA no longer requires both unconscionability and lack of disclosure to overturn a voluntarily signed agreement.[132] In fact, the UPMAA considers unconscionability as a wholly separate consideration from the four other factors.[133] Therefore, though the UPMAA does take much needed steps toward increased protection for weaker parties, it does not seem to adequately address all the concerns proposed by critics of the UPAA.

B. California Family Code Section 1615

Prior to the drafting of the UPMAA, the California legislature enacted California Family Code § 1615 which is more protective of weaker parties and allows for more predictability in enforcement. This statute was enacted in 2002 in response to *In re Marriage of Bonds*.[134] It identifies five requirements for voluntariness.[135] These requirements address (1) independent counsel, (2) timing, (3) explanation of terms and rights waived, (4) traditional contractual defenses, and (5) a catch-all provision.[136] Only if all five are satisfied will the prenuptial

agreement be enforced.[137] Though California still refuses to acknowledge a confidential relationship between parties to a prenuptial agreement, these new standards go a long way to protect parties with decreased bargaining power.

First, the California standard requires either independent counsel for both parties or a separate, written waiver of the same.[138] This standard clearly satisfies the concern for both the inequality of bargaining power and the inability to negotiate meaningfully. Additionally, requiring a separate, written waiver of independent counsel following such a recommendation reduces arguments regarding whether or not such advice was actually given as well as increasing the likelihood that a weaker party will actually consider this advice.

Second, in order for the signature to be voluntary, the statute requires a seven day 'cooling off' period between the final draft being presented and being signed.[139] Thus, prenuptial agreements can no longer be forced on a party on the eve of the wedding. There must be at least a week in which the parties are able to consider their rights and alternatives. Furthermore, this requirement enables parties the time to obtain independent counsel if they so choose, something nearly impossible to do in one day.

Third, and most importantly, the California statute states that, if parties are not represented by independent counsel, the unrepresented party must be informed (in a written document that is in the language in which he or she is proficient) of the terms and effects of the contract as well as the rights being waived by signing.[140] While still not fool-proof, this requirement greatly increases the chance that parties will be knowledgeable of their rights both under the contract and under the law of the state generally.

Finally, the fourth and fifth requirements represent the voluntariness standards in California and many other states prior to the enactment of this statute. As prenuptial agreements

are, at their core, contracts, regardless of any special circumstances present, the traditional contractual defenses of fraud, duress, undue influence, and lack of capacity and any other factors the court deemed relevant must be available to parties to prove that the agreement was involuntarily signed. Only the first three requirements represent significant changes in California law.

C. American Law Institute's Principles of the Law of Family Dissolution

Unlike the California statute and the UPMAA, the American Law Institute (ALI)'s proposed statute creates a presumption of informed consent and lack of duress if certain conditions are satisfied.[141] Like the California statute, the Principles of the Law of Family Dissolution were drafted in 2002 and propose significantly stronger protections than the UPMAA.[142] And, similar to the California statute, the ALI's proposal contains requirements regarding (1) timing, (2) independent counsel, and (3) explanation of the terms and rights of the parties to the agreement.[143] Finally, though it seems that the terms proposed by the ALI are stricter than those in California and the UPMAA, the fact that these trigger a presumption of enforcement rather than being required for enforcement makes it difficult to compare their strength.[144]

First, while California requires a seven day 'cooling off' period for couples, the ALI requires that thirty days have elapsed between the execution of the agreement and the date the parties' marry.[145] The practical application of this recommendation would require far more than a thirty day waiting period as, usually, parties do not contemplate, draft, and sign such agreements in the same day. Therefore, this condition is significantly stricter than that enacted in California.

Second, the ALI requires that both parties are advised to obtain independent counsel and have the ability to do so prior to signing the agreement.[146] Unlike the other two factors, this

provision is actually weaker than the standard adopted in California. In fact, it is more comparable to the language employed in the UPMAA.[147] There must, simply, be a recommendation of counsel and the time and ability to obtain said counsel in order for this factor to be satisfied.[148]

Third, like the UPMAA and the California Statute, the ALI requires that, if one party is unrepresented, the agreement must inform that party of his or her rights upon divorce, the nature of the waiver, and that the interests of the parties may be adverse.[149] However, unlike the UPMAA, which requires very basic language be included, and the California statute, which fails to explain what would satisfy such a requirement, the ALI's proposition includes illustrations that clearly establish this information must be detailed and written in a way that would be "easily understandable by an adult of ordinary intelligence with no legal training."[150] Therefore, it appears as though this too is a stricter requirement than those above.

Finally, unlike the UPMAA and the California Statute, the ALI does not require the above three conditions to be satisfied in order to enforce an agreement.[151] Thus, such an agreement may not be enforced even if it does satisfy the conditions.[152] Though this does increase the likelihood that only voluntarily and knowledgeably signed contracts will be enforced, it does decrease the amount of predictability available at the time of contracting. Therefore, depending on the interpretation of the state courts, it is questionable whether this proposal will result in stricter or more lenient enforcement of prenuptial agreements than the UPMAA or the California statute.

VI. Analysis of Solutions and a Final Recommendation

The goal of this proposal is to demonstrate that parties to a prenuptial agreement, or any couples contemplating marriage, are in a unique relationship and, thus, these agreements should

be subject to higher scrutiny. Though a majority of states do consider parties contemplating marriage to be a confidential relationship, the practical result of this is merely that they must reasonably disclose their assets to the other party prior to signing a prenuptial agreement.[153] While a confidential relationship traditionally requires that parties must exercise "good faith, candor, and sincerity," in negotiations with one another, courts consistently enforce agreements that are the result of unfair bargaining tactics.[154] It is this standard of utmost good faith that should justify a higher standard of scrutiny for voluntariness.

In creating higher standards of voluntariness, it is useful to look at the conditions recently established by the UPMAA, California, and the ALI. As analyzed above, all three require varying degrees of protections for parties entering into prenuptial agreements. From these standards, three clear considerations have emerged: (1) measuring the time between signing the agreement and the wedding, (2) emphasizing access to independent counsel, and (3) including an explanation of the rights of the parties and the terms of the waiver.[155]

Requiring these three factors to establish voluntariness will serve to eradicate all concerns addressed above. Specifically, if a cooling off period, independent counsel, and communication of rights and consequences are required, then the concern regarding the inequality of bargaining power and the advantage and pressure of one party can no longer result in the substantial disadvantage of the opposing party. Additionally, these new factors would serve to enhance the predictability of enforcement. Therefore, by enhancing the scrutiny of these agreements and creating standards which would allow parties to survive such scrutiny, states will be able to ensure both that contracts are enforceable and that they are reasonable.

A. Timing

As stated above, one of the primary concerns of critics has been the incredible number of cases in which a party is presented with the agreement on the eve of the wedding.[156] This, combined with many courts' reluctance to prohibit enforcement for this reason alone, has resulted in many agreements being enforced despite the existence of "surprise pressure tactics."[157] By establishing some sort of timing requirement like those found in the California statute and the ALI Principles, this concern would be easily eliminated.

The ALI and California standards analyzed above establish very different measures for this waiting period. In California, parties to a prenuptial agreement must wait at least seven days between drafting and signing an agreement.[158] This means that the agreement, while not presented immediately prior to the wedding, could be signed the day of the wedding.

The ALI, on the other hand, recommends that the agreement be signed thirty days prior to the wedding.[159] While this seems to prevent parties from signing an agreement the day of the wedding, as explained above, this is not a precondition to enforcement as it is in California.[160] Therefore, the agreement could easily be signed the day of the wedding provided that the signature was not the result of duress. This presents significant problems in its own right because, as explained much earlier, a finding of duress typically requires an unlawful threat which does not include pressuring a party to sign an agreement the day before the wedding.[161] Thus, it is clear that both solutions still present problems and some change to these standards is necessary.

The solution to this problem seems to be to combine the strengths of the two approaches. In other words, as in California, the waiting period must be a mandatory precondition to enforcement and, as in the ALI, the period should be measured between the signing of the draft

and the date of the marriage. Obviously the longer the waiting period, the more protective the statute will be. However, as explained in detail below, stricter independent counsel requirements should also serve to protect parties from being pressured to sign an agreement, and, therefore, the waiting period need not be long. Therefore, as it is a strict requirement and it is unnecessary to lengthen this period, a seven day waiting period between drafting and signing and another seven day waiting period between signing and marriage should be sufficient.

B. Independent Counsel or Knowledgeable Waiver

Along the same lines as the timing concerns, one of the pressing problems in the field of prenuptial agreements is the inability to meaningfully negotiate terms without the presence of or access to independent counsel.[162] In fact, it is widely acknowledged that the meaningful opportunity to obtain independent counsel significantly increases the likelihood that parties both understand and assent to the terms of the agreement.[163] The UPMAA, California Statute, and ALI Principles all include an independent counsel requirement.[164] However, only one of these solutions adequately ensures each party's right to independent counsel.

Both the UPMAA and the ALI require that parties have the opportunity to obtain legal counsel if they so choose.[165] While each does provide additional protections,[166] these protections do not seem to protect individuals any more than the current state statutes do. The California statute, on the other hand, does provide one significant requirement that seems to increase the protection of weaker individuals and provides objective evidence of compliance with these requirements. There, the statute requires that parties either obtain independent counsel or sign a separate, written waiver of the same.[167] While it is apparent that simply writing and signing documents without legal counsel does not conclusively establish that the waiver of counsel was voluntary or knowledgeable, this procedural safeguard is far more reliable than simple verbal

recommendation and waiver. Therefore, though it is significant that all three proposed solutions above include some level of access to independent counsel, imposing the California requirement of either independent counsel or separate, written waiver of the same provides an additional safeguard with only minor cost and inconvenience to the parties and, thus, is the recommended standard here.

C. Disclosure of Rights and Consequences

Finally, as explained above, one of the unique problems with prenuptial agreements is the parties' lack of knowledge regarding their rights upon divorce and the consequences of the agreement.[168] And, as in the independent counsel standards above, all three proposed solutions contain terms regarding plain language explanations of rights of the parties and terms of the agreement for unrepresented parties.[169] However, it is unclear exactly what such a disclosure would look like and how protective this standard would ultimately be.

Though the UPMAA, California Statute, and ALI Principles all contain substantially similar language regarding this disclosure of rights, it is clear that they do not all require the same level of detail and protection. First, though the California statute does not contain comments or illustrations of such a disclosure,[170] it seems to be the most protective as it requires that the disclosure (1) be in the plain language of the unrepresented party and (2) be provided to the party in a separate, written document.[171] As explained above, providing such information in a separate writing provides both additional protection for the weaker party and establishes importance and predictability in enforcement because it is objective evidence, unlike the testimony of the parties. Furthermore, unlike the UPMAA, which seems to principally protect native English speakers, the California statute and ALI Principles require the disclosure to be in a language easily understandable to the unrepresented party.[172]

Second, though the California statute and the ALI clearly require detailed disclosure which is specific to the particular prenuptial agreement in dispute, the UPMAA requires only a standard notice of waiver of rights.[173] This language, which was quoted in full above, is not dependent on the language of the agreement or the laws of the particular state in which the parties' are to be married.[174] The ALI, on the other hand, contains explicit illustrations which establish that such a waiver would be insufficient to satisfy the disclosure requirement.[175] In fact, these illustrations seem to require a detailed description of both the rights of the parties upon divorce in the state in which they are to marry and how the agreement modifies these rights.[176] It is clear that such an explanation would both significantly decrease parties' disparities in bargaining power and increase the predictability of enforcement. However, the use of a standardized 'waiver of rights' as provided for in the UPMAA would not improve the knowledge of the parties as it does not explain rights upon divorce and it not specific to the agreement between the parties. Therefore, the use of such a boilerplate disclosure is unlikely to remedy any of the problems discussed in depth above.

The proposed change to the rules is, therefore, a combination of the California statute and the ALI Principles. In order to properly remedy the problematic lack of knowledge of parties to prenuptial agreements, there must be a separate disclosure of each party's rights upon divorce and the effect of the agreement. This disclosure should be written in plain, easily understood terms in the language primarily spoken by the unrepresented party. Such a disclosure will both protect the interests of the unrepresented party and promote predictability in the enforcement of the agreement.

VII. Conclusion

The concerns expressed in this paper have gradually been gaining acceptance over the decades since the UPAA was enacted. This is evidenced by the fact that the ALI, the Uniform Law Commission, and various state legislatures have begun modifying the standards for enforcing prenuptial agreements. However, there is still a significant conflict between the policies supporting the protection of individuals with disparate bargaining power and that of the freedom to contract. In order to adequately balance these concerns, the proposal advocated here combines the various standards established by the UPMAA, California legislature, and the ALI. Ultimately, the solution involves (1) a timing requirement in which parties must draft the agreement at least seven days prior to signing and sign at least seven days prior to the wedding, (2) an independent counsel requirement or the separate, written waiver of the same, and (3) a disclosure requirement which details both the rights of the parties upon divorce in the state in which they currently reside and the effect of the terms of the agreement in the primary language of the unrepresented party. The combination of these three requirements would significantly decrease use of unfair bargaining tactics without excessively burdening the party with superior bargaining power.

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[1] Also called premarital agreements or antenuptial agreements.
[2] *See Prenuptial Agreements are on the Rise, And More Women are Requesting Them*, The Huffington Post, Oct. 22, 2013, http://www.huffingtonpost.com/2013/10/22/prenups-_n_4145551.html. [hereinafter *Prenuptial Agreements are on the Rise*].
[3] Laura Petrecca, *Prenuptial Agreements: Unromantic, but Important*, USA TODAY, Mar. 11, 2010, http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08_cv_n.htm.
[4] *See Id.* (estimating approximately 3% of couples sign prenuptial agreements); *and* Heather Mahar, *Why Are There So Few Prenuptial Agreements?* (Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper 436, 2003), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf.
[5] *See Id.* at 5, 18.
[6] *See* Petrecca, *supra* note 3 (explaining that the 3% figure represented a significant increase from the 1% reported less than ten years earlier).
[7] 5 Williston on Contracts § 11:8 at 1 (May 2014).
[8] *See Simeone v. Simeone*, 581 A.2d 162, 166 (Penn. 1990).
[9] *In re Marriage of Bonds*, 5 P.3d 815, 823-24 (Cal. 2000).

[10] Unif. Premarital Agreement Act prefatory note, 9C U.L.A. 35 (1983) [hereinafter *UPAA Prefatory Note*].
[11] *See* Chelsea Biemiller, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania is the Right Approach for Review*, 6 Drexel L. Rev. 133, 147-48 (2013).
[12] *Id.* at 147-48.
[13] Unif. Premarital Agreement Act § 6(a)(2), 9B U.L.A. 376 (1987).
[14] Biemiller, *supra* note 11, at 147-48.
[15] *Id.* at 149.
[16] Unif. Premarital Agreement Act § 6(a)(1).
[17] *Id.*
[18] J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 Duke J. Gender L. & Pol'y 83, 86 (2011).
[19] 30 Causes of Action 2d at 155 (December 2014).
[20] *In re Estate of Hollett*, 834 A.2d 348, 351 (N.H. 2003) (quoting *Lutgert v. Lutgert*, 338 So.3d 1111, 1115 (Fla. Dist. Ct. App. 1976)).
[21] Oldham, *supra* note 18, at 104.
[22] *See Id.* at 83 (detailing the inadequacies of the UPAA); *Bonds* (which resulted in a significant change in standards by the California legislature); *and* Sarah Kennedy, *Ignorance is Not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements*, 52 Fam. Ct. Rev. 709, 713 (2014) (finding that current standards are insufficient to protect parties to prenuptial agreements).
[23] *See* Biemiller, *supra* note 11, at 147-48.
[24] Oldham, *supra* note 18, at 88.
[25] *See Id.* at 115, 125; and *Bonds*, 5 P.3d at 831.
[26] Kennedy, *supra* note 22 at 713.
[27] *Id.*
[28] *Id.* at 712; Biemiller, *supra* note 11, at 152 (finding that most states do not have a per se requirement of independent counsel); and *See* Lynn A. Baker and Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439, 441 (1993) (finding that survey respondents correctly identified rights under divorce statutes only slightly more often than random chance would predict).
[29] Oldham, *supra* note 18 at 90.
[30] *See* Petrecca, *supra* note 3.
[31] Kennedy, *supra* note 22, at 709; *See also* Petrecca, *supra* note 3 (stating that individuals with significant assets, which may come with age, and those entering second marriage should consider signing a prenuptial agreement).
[32] *See Hollett*, 834 A.2d at 349; and *Mallen v. Mallen*, 622 S.E.2d 812, 814 (Ga. 2005); and *Bonds*, 5 P.3d at 816.
[33] *Bonds*, 5 P.3d at 816, 817, 819.
[34] *Id.* at 838.
[35] *Id.* at 837-38.
[36] Oldham, *supra* note 18, at 89; *See In re Marriage of Shirilla*, 89 P.3d 1, 1-3 (Mont. 2004) (holding prenuptial agreement unenforceable when non-English speaking wife was unrepresented by counsel during negotiations and immigrated to the United States in order to marry fiancé); *Mallen*, 622 S.E.2d at 814 (finding prenuptial agreement was enforceable despite the fact that husband proposed to wife while she was waiting to abort baby, husband requested wife sign agreement mere days later, and, though wife attempted to see independent counsel, she was unable to find an attorney who could "fully examine" the agreement before the wedding).
[37] Oldham, *supra* note 18, at 89.
[38] 2001 Iowa App. LEXIS 476 (2001).
[39] *Id.* at *5.
[40] *Id.*
[41] National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, I. Premarital Agreement Act (July 23-26, 1983) pp. 71-73.
[42] *Id.*; *See also Bonds*, 5 P.3d at 825.
[43] Oldham, *supra* note 18, at 89.
[44] *See Bonds*, 5 P.3d at 823; and Oldham, *supra* note 18, at 88.
[45] Oldham, *supra* note 18, at 88.
[46] *Id.*
[47] *Bonds*, 5 P.3d at 824-26.

[48] Oldham, *supra* note 18, at 89.
[49] 5 P.3d at 816, 817, 819.
[50] Oldham, *supra* note 18, at 89.
[51] 581 A.2d 162 (Pa. 1990).
[52] *Id.* at 163.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 167-68.
[58] Proceedings, Uniform Act at 71-73.
[59] *See Hollett*, 834 A.2d at 352 ("the timing of the agreement is of paramount importance in assessing whether it was voluntary."); Cal. Fam. Code § 1615(c) (West 2002) (establishing a requirement for independent counsel or separate written waiver and, if unrepresented, a written statement of the effect of the agreement).
[60] Oldham, *supra* note 18, at 90.
[61] *Id.*
[62] *Id.* at 84.
[63] *Bonds*, 5 P.3d at 831.
[64] Agreements substantially similar to prenuptial agreements that are signed after the couple is married.
[65] *Bonds*, 5 P.3d at 831.
[66] *Id.* at 820.
[67] *Parham v. Walker*, 568 S.W.2d 622, 624 (Tenn. Ct. App. 1978) ("The burden is upon the one who alleges the existence of such a confidential relationship to prove it. … Once its existence is proven, undue influence is presumed and the recipient must prove an exception to the presumption by carrying the burden of showing the fairness of the transaction and the non-existence of the presumed undue influence.").
[68] *Yarbrough v. Kirkland*, 548 S.E.2d 670, 673 (Ga. Ct. App. 2001).
[69] *Id.*
[70] *See* Kennedy, *supra* note 22, at 710.
[71] Mahar, *supra* note 4, at 7, 9.
[72] *Id.* at 9.
[73] *See New Clark Poll: 18- to 29-year-olds are traditional about roles in sex, marriage and raising children*, Clark University, August 7, 2012, http://news.clarku.edu/news/2012/08/07/new-clark-poll-18-to-29-year-olds-are-traditional-about-roles-in-sex-marriage-and-raising-children/.
[74] Mahar, *supra* note 4, at 14.
[75] *See Id.* at 22; and Petrecca, *supra* note 3 ("'People are hopeful … [t]hey want their relationship to last. ... It's just natural that they don't think they'll need a prenup. Never in a million years do they think (divorce) will happen.'").
[76] *See* Baker, *supra* note 28, at 441.
[77] *Id.*
[78] *Id.* at 444-45.
[79] *Id.* at 445.
[80] *Id.*
[81] Kennedy, *supra* note 22, at 710.
[82] *Hollett*, 834 A.2d at 351 ("'the parties must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the terms and execution of the proposed agreement, with fairness being *43 the ultimate measure.'") (quoting Lutgert v. Lutgert, 338 So.2d 1111, 1115 (Fla.Dist.Ct.App.1976)).
[83] Oldham, *supra* note 18, at 89.
[84] 5 Williston on Contracts § 11:8 at 2.
[85] Oldham, *supra* note 18, at 121.
[86] Mahar, *supra* note 4, at 7, 9; Baker, *supra* note 28, at 441.
[87] Oldham, *supra* note 18, at 122.
[88] *See* Terry J. Turnipseed, *Why Shouldn't I be Allowed to Leave My Property to Whomever I choose at my Death? (or How I Learned to Stop Worrying and Start Loving the French)*, 44 Brandeis L.J. 737, 782 (2006); *Ponder v. Blue Cross of Southern California*, 145 Cal. App. 3d 709, 718 (Cal. App. 2d Dist. 1983).
[89] *See Id.* at 782 ("Forty-nine of fifty states have laws in place to protect, to one extent or another, against spousal disinheritance via either community property or elective share laws.").

[90] *Id.* at 739.
[91] *In re Estate of Geyer*, 433 A.2d 423, 429 (Pa. 1985).
[92] Oldham, *supra* note 18, at 83.
[93] *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970)
[94] Kennedy, *supra* note 22 at 710.
[95] *Simeone*, 581 A.2d at 168 (Papadakos, J. Concurring).
[96] *Ponder*, 145 Cal. App. 3d at 718.
[97] *Id.*
[98] *See Hollett*, 834 A.2d at 352 ("Erin's bargaining position was vastly inferior to that of her husband … [and] If Erin refused to sign the agreement, she thus not only stood to face the embarrassment of canceling a two hundred guest wedding, but also stood to lose her means of support.").
[99] *Simeone*, 581 A.2d at 168 (Papadakos, J. Concurring).
[100] 581 A.2d at 400.
[101] *Id.* at 167.
[102] *See* Biemiller, *supra* note 11, at 163.
[103] Ashby Jones, *Why Do We Need the State's Permission to Get Married Anyway?*, Wall St. J., Jan. 14, 2010, http://blogs.wsj.com/law/2010/01/14/why-do-we-need-to-ask-the-state-for-permission-to-get-married-anyway/.
[104] Biemiller, *supra* note 11, at 163.
[105] *Id.*
[106] 581 A.2d at 166.
[107] *See* Biemiller, *supra* note 11, at 147-48, n. 90.
[108] *Id.* at 165.
[109] *Id*.
[110] *See* Kennedy, *supra* note 22, at 719.
[111] Oldham, *supra* note 18, at 89.
[112] *See* Biemiller, *supra* note 11, at 155-56.
[113] *Simeone*, 581 A.2d at 165.
[114] *See* Biemiller, *supra* note 11, at 164-72.
[115] *Id.* at 165-66.
[116] *See* Oldham, *supra* note 18, at 88.
[117] *Simeone*, 581 A.2d at 168 (Papadakos, J. Concurring).
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *See* Oldham, *supra* note 18; Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 J. Legis. 127 (1993).
[123] *Premarital and Marital Agreement Act*, Uniform Law Commission (accessed on March 24, 2015), http://www.uniformlaws.org/Act.aspx?title=Premarital%20and%20Marital%20Agreements%20Act.
[124] *Id.*
[125] Uniform Premarital and Marital Agreement Act § 9, pg. 11-16 (2012) *available at* http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf.
[126] *Id.* at 13.
[127] *Id.*
[128] *Id.* at 11.
[129] *Id.*
[130] *Id.* at 12.
[131] *Id.*at 11.
[132] *Id.*
[133] *See Id.* at 13.
[134] *See California Bill Analysis*, S.B. 78 Assem., 7/17/2001 ("[t]he author introduced this bill in response to two decisions last year by the California Supreme Court which focused on the enforceability of pre-marital agreements generally").
[135] Cal. Fam. Code § 1615(c).
[136] *Id.*

[137] *Id.*
[138] Cal. Fam. Code § 1615(c)(1).
[139] Cal. Fam. Code § 1615(c)(2); *See also In re Marriage of Cadwell-Faso and Faso*, 2011 WL 72179 at *1 (Cal. Ct. App. Jan. 11, 2011) ("the seven-day clock did not begin to run from the presentation of the first draft of the addenda.").
[140] Cal. Fam. Code § 1615(c)(3).
[141] Principles of the Law of Family Dissolution § 7.04 (2002).
[142] *Id.*
[143] Cal. Fam. Code § 1615(c); Principles of the Law of Family Dissolution § 7.04.
[144] *Cf.* Cal. Fam. Code § 1615(c) and Principles of the Law of Family Dissolution § 7.04.
[145] Cal. Fam. Code § 1615(c)(2); Principles of the Law of Family Dissolution § 7.04(3)(a).
[146] Principles of the Law of Family Dissolution § 7.04(3)(b).
[147] *Compare* Uniform Premarital and Marital Agreement Act § 9(b); *and* Principles of the Law of Family Dissolution § 7.04(3)(b).
[148] Uniform Premarital and Marital Agreement Act § 9(b).
[149] Uniform Premarital and Marital Agreement Act § 9(c); Cal. Fam. Code § 1615(c)(3); Principles of the Law of Family Dissolution § 7.04(3)(c).
[150] Principles of the Law of Family Dissolution § 7.04 Cmt. (f).
[151] *See Id.* at cmt. (c).
[152] *Id.*
[153] *See* 41 C.J.S. Husband and Wife § 125 (Dec. 2014).
[154] *Id.*
[155] *See* Uniform Premarital and Marital Agreement Act § 9; Cal. Fam. Code § 1615(c)(3); Principles of the Law of Family Dissolution § 7.04(3)(c).
[156] Oldham, *supra* note 18, at 117-18.
[157] *Ingmand*, 2001 Iowa App LEXIS 476 at *5.
[158] Cal. Fam. Code § 1615(c)(2).
[159] Principles of the Law of Family Dissolution § 7.04(3)(a).
[160] Cal. Fam. Code § 1615(c)(2); Principles of the Law of Family Dissolution § 7.04(3).
[161] Oldham, *supra* note 18, at 96-97.
[162] Kennedy, *supra* note 22, at 710.
[163] *See Id.* at 718.
[164] Uniform Premarital and Marital Agreement Act § 9; Cal. Fam. Code § 1615(c)(1); Principles of the Law of Family Dissolution § 7.04(3)(b).
[165] *See* Uniform Premarital and Marital Agreement Act § 9; Principles of the Law of Family Dissolution § 7.04(3)(b).
[166] *See* Uniform Premarital and Marital Agreement Act § 9 (requiring sufficient time and opportunity to obtain counsel as well as reasonable financial ability); *and* Principles of the Law of Family Dissolution § 7.04(3)(b) (requiring that both parties are advised to seek independent counsel).
[167] Cal. Fam. Code § 1615(c)(1).
[168] *See* Baker, *supra* note 28, at 441.
[169] *See* Uniform Premarital and Marital Agreement Act § 9; Cal. Fam. Code § 1615(c)(3); Principles of the Law of Family Dissolution § 7.04(3)(c).
[170] No published cases have addressed this requirement to date.
[171] Cal. Fam. Code § 1615(c)(3).
[172] *Compare.* Uniform Premarital and Marital Agreement Act § 9 ("unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement"); *with* Principles of the Law of Family Dissolution § 7.04(3)(c) (the agreement states, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at dissolution that are altered by the contract, … the nature of that alteration, and that the interests of the spouses with respect to the agreement may be adverse."); *and* Cal. Fam. Code § 1615(c)(3) ([t]he party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the

agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written.").
[173] *See* Uniform Premarital and Marital Agreement Act § 9; Cal. Fam. Code § 1615(c)(3); Principles of the Law of Family Dissolution § 7.04(3)(c).
[174] Uniform Premarital and Marital Agreement Act § 9(c).
[175] Principles of the Law of Family Dissolution § 7.04 Illustrations 11 & 12.
[176] *Id.*